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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-1536

ANDREW P. HART AND KIRBY LUMBER CORPORATION,
*Petitioners,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

## BRIEF OF KIRBY FOREST INDUSTRIES, INC. AND ANDREW P. HART IN RESPONSE TO THE BRIEF OF THE UNITED STATES IN OPPOSITION

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The Government, in its Brief in Opposition, engages in two material and basic misconceptions. Stated here generally, with brief amplification and discussion to follow, the misconceptions are as follows:

1. The Government contends[1] that the statute of limitations set forth in the Quiet Title Act [28 U.S.C. § 2409 a(f)] "expressly or impliedly forbids the relief which is sought" in this action within the meaning of the 1976 Amendment to Section 10(a) of the Administrative Pro-

1. Brief in Opposition, footnote 4, page 6.

cedure Act (5 U.S.C. § 702), which contention is a basic misconception of the meaning and intent of the 1976 Amendment and of the nature and effect of a statute of limitations.

2. The Government also contends[2] that the 1961 deed may be viewed apart from the limitations upon the authority of the Corps of Engineers, which is a misconception of basic Constitutional and statutory limitations upon governmental action in the taking and holding of property for public use.

## MISCONCEPTION NO. 1

The Government, by saying that a statute of limitations "forbids relief" within the meaning of the 1976 Amendment, first, confuses a bar of relief with the expression of an exclusive remedy, and, second, overlooks the specific expression of intent set forth in the legislative history of the 1976 Amendment which clearly delineates the type of statutory limitation which Congress had in mind in connection with the "forbidding relief" concept.[3]

2. Id, page 7.

3. See [1976a] U.S. Cong. & Adm. News, 6133 (92nd Cong. 2d Sess.) which reads as follows:

"Likewise, the amendment to 5 U.S.C. section 702 is not intended to permit suit in circumstances where statutes forbid or limit the relief sought. Clause (2) of the third new sentence added to section 702 contains a second proviso concerned with situations in which Congress has consented to suit and the remedy provided is intended to be the exclusive remedy. For example, in the Court of Claims Act, Congress created a damage remedy for contract claims with jurisdiction limited to the Court of Claims except in suits for less than $10,000. The measure is intended to foreclose specific performance of government contracts. In the terms of the proviso, a statute granting consent to suit, i.e., the Tucker Act, 'impliedly forbids' relief other than the remedy provided by the Act. Thus, the partial abolition of sovereign immunity brought about by this bill does not change existing limitations on specific relief, if any, derived from statutes dealing with such matters as government contracts, as well as patent infringement, tort claims, and tax claims.

The language of clause (2) of the proviso directs attention to particular statutes and the decisions interpreting them. If a statute 'grants consent to suit' with respect to a particular subject matter, specific relief may be obtained only if Congress has not intended that provision for relief to be exclusive.

Clause (2) of the proviso does not withdraw specific relief in any situation in which it is now available. It merely provides that new authority to grant specific relief is not conferred when Congress has dealt in particularity with a claim and intended a specified remedy to be the exclusive remedy." (Footnotes omitted).



A statute of limitations is not an expression of an exclusive remedy. It is, rather, the expression of a time-bar to the remedy which the claimant seeks. Congress clearly intended to refer to the expression of an exclusive remedy in prior consent legislation—and not to statutes of limitations—to determine whether such prior legislation "forbids relief", there referring specifically to the Court of Claims Act, where a damage remedy was created for contract claims. The House Report there sets out the remedy intended to be forbidden by such exclusive remedy: specific performance of government contracts.

A statute of limitations cannot be an expression of an exclusive remedy not only because it is not a limitation on the *nature* of the remedy, but because it depends upon conduct outside of the statute for its effectiveness, i.e. a non-enforcement of the remedy for the statutory period. Is the remedy sought by a claimant affected by the statute of limitations if suit is brought *within* the statutory period? Obviously not. Just as obviously, therefore, the statute of limitations cannot be utilized to define the exclusivity of a particular remedy.

The question posed by the Government in reality is whether the Quiet Title Act expressly or impliedly forbids

the relief sought here. If it does not, then there is no reason why the 1976 Amendment should not be applicable to this action, to aid in the construction of the intent of Congress regarding "strict" interpretation of consent statutes, Petitioners' arguments on which are submitted in their Petition.

Whether or not the Quiet Title Act forbids an equitable suit for reformation, designed to remove cloud on title, may be disposed of quickly. The 1972 enactment, 86 Stat. 1176 (1972), was expressly designed to permit equitable actions to quiet title. There is no provision in the act which specifically defines any exclusive remedy. Reference is made only to actions "to quiet title to an estate or interest in real property" [28 U.S.C. §§ 1346 (f); 1402(d)] and to actions "to adjudicate a disputed title to real property" [28 U.S.C. § 2409a(a)]; and it was specifically observed in the legislative history[4] that the

4. "As was observed in the executive communication transmitted to the Congress by the Department of Justice, individual citizens are presently unable to bring an action to quiet title in which the United States can be joined as a party defendant. The doctrine of sovereign immunity presently prevents suits of this type from being brought against the United States. The history of this type of action goes back to the Courts of England. Suits to quiet title or to remove a cloud on title originated in the equity court of England. They were in the nature of bills *quia timet*, which allowed the plaintiff to institute suits when an action would not lie in a court of law. For instance, a plaintiff whose title to land was continually being subjected to litigation in the law courts could bring a suit to quiet title in a court of equity in order to obtain an adjudication of title and relief against further suits. Similarly, one who feared that an outstanding deed or other interest might cause a claim to be presented in the future could maintain a suit to remove a cloud on title. Under old English practice, the plaintiff in such suits was required to be in possession, and the usual grounds of equitable jurisdiction (an imminent threat and an adequate remedy at law) had to be present."
[1972] U.S. Code Cong. & Ad. News, 4551 (92d Cong. 2d Sess.).



quiet title action originated in the English equity courts. Clearly, the specific purpose was to authorize *equitable* actions concerning land; and as set forth in our Petition, this purpose is entirely consistent with the purpose of the 1976 Amendment, which also authorized *equitable* proceedings. Moreover, the section[5] which specifically set forth the actions to which the statute did *not* apply concerned prior consent statutes, and did *not* mention reformation as an excluded action, and did *not* limit the type of equitable actions which might be brought.

Clearly a suit to quiet title is an equitable proceeding. *Humble Oil & Refining Co. v. Sun Oil Co.*, 191 F.2d 705 (5th Cir. 1951); 74 C.J.S. *Quieting Title*, § 1, p. 10; and reformation the effect of which is to remove cloud on title is equally clearly an equitable proceeding. *Walden v. Skinner*, 101 U.S. 577, 25 L.Ed. 963 (1879); *Ivinson v. Hutton*, 98 U.S. 79, 25 L.Ed. 66 (1878). There is no incompatibility, therefore, in the nature of the relief sought here and that authorized by Congress in the Quiet Title Act. As a result, there is no reason why the 1976 Amendment to the Administrative Procedure Act should not be applicable, authorizing, as it does, *equitable* actions against the Government.

The effort here by the Government, as with so many prior efforts, is once against to seek a "strict" construction of consent statutes, notwithstanding the clear mandate of

5. 28 U.S.C. § 2409a(a), referring to Title 28, §§ 1346, 1347, 1491 and 2410, which were consent statutes relating to tort claims and to certain actions under the Internal Revenue Code, partition actions, Court of Claims actions relating to land, and to actions involving property where the United States claims a mortgage or other lien; and Sections 7424, 7425 or 7426 of the Internal Revenue Code, relating to tax liens; and to Title 43, § 666 relating to actions for the adjudication of water rights.

the 1976 Amendment. The obvious, and correct, construction of the limitation in Section 702[6] relied upon by the Government, that nothing in the 1976 Amendment "confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought" is simply that such limitation is not to be strictly construed in favor of the Government. Thus, if the language of a particular consent statute may be construed in such a way as to allow an action, or if an exclusive remedy expressed therein may be construed in such a way as not to forbid an action, such constructions *must be adopted.*

## MISCONCEPTION NO. 2

The Government, in its effort to isolate the 1961 deed, is saying, on the one hand, that when it suits the Government's purpose to be treated as a sovereign, it will plead as a sovereign, and, on the other hand, when it suits the Government's purpose to be treated as an individual, it will plead as an individual. But in seeking to have the 1961 deed construed within its four corners (as in an action involving individuals), the Government very conveniently overlooks the fact that it *is* a government, existing under and subject to certain restrictions to which individuals are not subject.

*"Every acquisition, holding or disposition of property by the Federal Government depends upon proper exercise of a constitutional grant of power." United States v. Allegheny County,* 322 U.S. 174, 182, 64 S.Ct. 908, 88 L.Ed. 1209 (1944). An equally basic corrolary to such principle is that governmental officers and agencies may not

6. For full text of Section 702, see Appendix IV to Petition, page 54 (5 U.S.C. § 702).



act in excess of express statutory authority or agency guidelines. It therefore clearly follows that the agency guidelines must be read in conjunction with the 1961 deed, and if the deed is shown to be in excess of authority, it must either fall or be reformed.

Moreover, as a question of notice, the 1961 deed could not place Petitioners on notice of the claim of the United States in 1961 because it is presumed that the Corps of Engineers acted within its authority as expressed by the agency guidelines setting forth the 179-foot level as the measure of the power to acquire. *Federal Communications Commission v. Schreiber,* 381 U.S. 279, 85 S.Ct. 1459, 14 L.Ed.2d 383 (1965). Petitioners were entitled to rely upon that presumption until the contrary became apparent, which did not occur until 1973 with the resurvey work of Petitioner Hart. Prior to such time Petitioners neither knew nor should have known that the acquisition by the United States was in excess of established authority, and that therefore its "claim" extended to more than was intended by the parties. The "mistake" was clearly shown. Reformation was therefore appropriate.

## CONCLUSION

The Government has not demonstrated any basis on which the decision of the Court of Appeals may be supported. The passage of the 1976 Amendment is a landmark in American jurisprudence. The effect of such amendment on the construction of consent statutes and other statutes defining the relationship between the Federal Government and the citizens of this nation is at least as important as *Erie Railroad v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). The

petition for writ of certiorari to review these vitally important questions of federal law should be granted.

Respectfully submitted,

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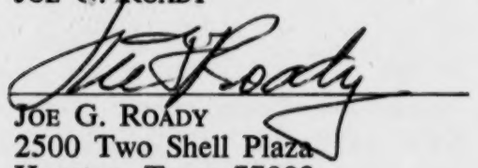
By: 
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**CERTIFICATE OF SERVICE**

I certify that copies of the Brief of Kirby Forest Industries, Inc. and Andrew P. Hart in Response to the Brief of the United States in Opposition, to the United States Court of Appeals for the Fifth Circuit have been served upon counsel by placing same in the United States mail, postage prepaid, and properly addressed, this 13th day of June, 1979, to:

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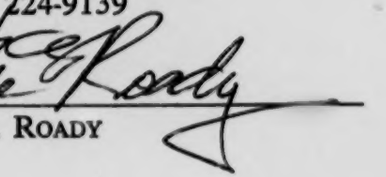
By: 
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